



Legal aid reform: the unified civil contract

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Until April 2007 there were a variety of standard contracts governing the relationship between legal aid service providers and the Legal Services Commission (the LSC), the body responsible for administering the legal aid scheme. These included a General Civil Contract for solicitors, a General Civil Contract for not for profit providers and two Mediation Contracts (For Profit and Not For Profit).

In July 2005 mounting concerns about legal aid expenditure led the then Lord Chancellor to commission a review of civil and criminal legal aid procurement. The review, conducted by Lord Carter, published its final report in July 2006. In response to the report, the Department for Constitutional Affairs (DCA) and the LSC published a joint consultation paper, *Legal Aid: a sustainable future*. This invited views on a number of legal aid proposals, including replacing the existing standard contracts with a single unified contract regime.

In November 2006 the DCA and the LSC published *Legal Aid Reform: The Way Ahead*, in which they confirmed that a new unified contract would replace the existing standard contracts on 1 April 2007. The key structural difference between the General Contracts and the Unified Contract was that each legal aid provider would have one Unified Contract, instead of a contract per office.

Following the Unified Contract's introduction, the Law Society issued judicial review proceedings challenging one of its terms which entitled the LSC to unilaterally amend the Unified Contract. The Law Society's claims were upheld. In January 2008 the Law Society threatened further legal proceedings, although in April 2008 it reached an out of court agreement with the LSC and the Ministry of Justice that the Unified Contract would continue with no further changes until April 2010. The Government also committed to publish details and a timetable of future legal aid reforms; *Civil Legal Aid contracts: the next five years* was published in April 2008. Consultation on the terms of the 2010 Unified Contract is ongoing.

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1 The provision of civil legal aid

The Legal Services Commission (LSC) is responsible for the provision of legal aid in England and Wales. The LSC has responsibility for two schemes – the civil scheme for funding civil and family cases as part of the Community Legal Service (CLS), and the Criminal Defence Service (CDS) which provides advice and representation for people accused of a serious criminal offence. This Standard Note considers the provision of services via the CLS.

Providers are required to have a contract with the LSC in order to provide publicly funded civil legal services. Until 31 March 2007 there were separate General Civil Contracts for solicitors and not for profit providers. On 1 April 2007 these separate contracts and the Family Mediation Contract were replaced by the Unified Contract for all providers. The Unified Contract has since been amended a number of times, most recently in November 2008.

2 Legal aid reform

2.1 Background

Between 1997 and 2006 the cost of legal aid increased from £1.5 billion to £2.1 billion.¹ Between 1997 and 2004, spending on criminal legal aid rose 37%, whilst spending on civil and family legal aid (excluding immigration and asylum), fell by 24%.² Various reforms have been introduced over recent years, often in relation to specific areas of concern (such as

¹ Department of Constitutional Affairs, [Legal Aid: a sustainable future](#), CP 13/06, July 2006, p3
² Ministry of Justice news release, [Legal aid reform is about helping as many as possible](#), 22 June 2007

very high cost cases). In July 2005, the Department of Constitutional Affairs (the DCA) commissioned Lord Carter of Coles to review legal aid procurement (civil and criminal). In his final report, Lord Carter concluded that there must be a fundamental change in the way in which legal aid services are procured.

2.2 The Carter Review

Lord Carter's final report was published on 13 July 2006 (the Review).³ The Review set out detailed and costed recommendations for a new procurement system for legal aid in England and Wales. Key recommendations included the introduction of standard fees for civil and family legal help, and new graduated fees for solicitors in private law family and child care proceedings.

2.3 Legal aid: a sustainable future

In response to the Review, on 13 July 2006 the DCA and the LSC jointly published a consultation paper, *Legal Aid: a sustainable future*.⁴ This invited comments on proposals to implement the first stages of Lord Carter's reforms for civil and family legal aid, including proposals for a unified contract to bring all providers of legal aid services under a single contract regime. The LSC stated that it believed that the creation of a unified contract would "significantly simplify our relationship with all our providers".⁵ The consultation paper included a draft overview of the proposed Unified Contract and the ways in which it would differ from the existing General Contracts, for example:

- There would eventually only be one Unified Contract for each LSC provider, instead of separate General Contracts for each office.
- In common with many commercial contracts, the Unified Contract would have a term of three years with an option (exercisable within the first two years) for the LSC to extend it for a further two years.
- The LSC would move to "light touch" auditing, with providers monitoring their own performance against Key Performance Indicators set out in the Unified Contract.
- The Unified Contract would specify that LSC providers must be able to communicate with the LSC electronically, and would enable the LSC to specify the technical functionality of providers' case management systems.
- The Unified Contract would give the LSC power to conduct "mystery shopper" exercises.⁶

2.4 Legal aid reform: the way ahead

On 28 November 2006, the DCA and the LSC jointly published *Legal Aid Reform: The Way Ahead*,⁷ together with a summary of responses to the consultation.⁸ The joint paper set out how the DCA and the LSC intended to deliver a new system of legal aid procurement.

The joint paper stated that most respondents supported the concept of a Unified Contract for crime, civil and not for profit providers. It confirmed that the LSC would be implementing the

³ DCA/Lord Carter of Coles, [Legal Aid A market-based approach to reform](#), July 2006

⁴ DCA/LSC, [Legal Aid: a sustainable future](#), CP 13/06, July 2006

⁵ Ibid, p78

⁶ Ibid, pp80-86

⁷ DCA/LSC, [Legal Aid Reform: The Way Ahead](#), Cm 6993, November 2006

⁸ DCA/LSC, [Legal Aid: a sustainable future – analysis of responses](#), November 2006

Unified Contract in April 2007 for civil providers and that it would take effect from 1 April 2008 for crime providers:

The Unified Contract will contain revised standard terms, but the Contract Specification will remain largely in its current form until introduction of the new fee schemes in October 2007. Changes to the Specification to implement the fee schemes will be consulted upon.⁹

The consultation had proposed a unified contract with a fixed minimum income level of £25,000 or £50,000 to be introduced in April 2007. The joint paper acknowledged that a majority of respondents were against this proposal and stated that:

the issues of access and impact need to be considered carefully before such a measure is introduced. This would drive an incremental approach and further analysis. The LSC will therefore include a power to introduce a minimum contract size in the Standard terms for the Unified Contract, but there will be no minimum introduced in April 2007.¹⁰

3 The Unified Contract

The Unified Contract replaced the General Civil Contract and Family Mediation Contract with the LSC on 1 April 2007. It brought not for profit agencies under the same contract as solicitors' firms. In a document introducing the new Unified Contract the LSC described the standard contract terms as follows:

The new Standard Terms aim to build on the General Civil Contracts and include similar provisions, although they have been updated and, where possible, simplified.

The layout is different but we do not expect the new Standard Terms will make any significant difference to the day-to-day operation of Contract Work. The Unified Contract Standard Terms are in many respects identical or very similar to the existing terms, with key amendments to pave the way for the reform programme.¹¹

The LSC summarised the main contract changes as follows:

The main changes include:

- a more efficient way of working by issuing one contract per organisation rather than one per office
- new provisions about e-business and equality and diversity
- new Payment on Account provisions as agreed with the representative bodies
- setting a minimum and maximum number of new cases to be started by an individual office each year.¹²

The current Unified Contract is in force until 31 March 2010; detailed terms, and other information, are available on the LSC website.¹³

⁹ DCA/LSC, *Legal Aid Reform: The Way Ahead*, Cm 6993, November 2006, p37

¹⁰ *Ibid*, p38

¹¹ LSC, *Unified Contract – summary of contract documents and FAQ*, 26 February 2007, p7

¹² http://www.legalservices.gov.uk/civil/unified_contract_civil.asp

¹³ *Ibid*

4 The April 2008 Agreement

In April 2008 the Law Society and the LSC reached an agreement regarding changes to the Unified Contract, fees and other matters, following legal action and a period of what the Law Society described as “robust negotiations”. This followed a long period of negotiation and litigation concerning perceived flaws in the contract.

4.1 Background to the dispute

In February 2007, the Law Society outlined its concerns with the proposals for a unified contract:

The Legal Services Commission's new unified contract for legal aid will introduce unprecedented changes to the legal aid system. The Law Society believes the contract is deeply flawed and does not represent a fair deal for practitioners.

We have pressed vigorously for key amendments to the contract, to remove several oppressive terms. The contract must offer practitioners a high degree of certainty and be fair in all its terms.

Our key concerns are that the contract:

- may be unilaterally amended by the LSC on as little as 7 weeks' notice
- purports to oust the jurisdiction of the courts in relation to recovery of certain costs
- is terminable by the LSC without fault on 6 months' notice without compensation
- contains a number of provisions entitling the LSC to act with complete discretion, unlimited by any contractual requirement to act reasonably or proportionately
- contains a number of provisions lacking reciprocity.¹⁴

In March 2007, a survey carried out by the Law Society claimed that only 1% of firms were happy with the new contract, while 11% of firms said they would not sign the contract in the form offered.¹⁵

On 30 March 2007, the LSC announced that a large majority of law firms and not-for-profit agencies had signed the new civil legal aid contract and would be continuing to provide civil legal aid services:

The LSC has already received signed Unified Civil Legal Aid Contracts from more than 85% of providers. More are being received and processed today, with hundreds being hand delivered to the LSC's regional offices.

To protect the interests of clients, the LSC has authorised firms who have chosen not to sign the contract to continue with existing cases. However, they will not be able to accept new legal aid cases.

(...)

The Law Society has raised concerns about the LSC having the ability to amend and terminate the contract. The LSC has had powers of amendment and termination in its contracts since 2000. The new unified contract has kept the same periods of

¹⁴ The Law Society, [Unified legal aid contract – the Law Society's policy and a summary of lobbying work](#), 28 February 2007, p1

¹⁵ Law Society press release, [99% of firms unhappy with the unified contract](#), 27 March 2007

consultation and notice as existing contracts but introduced a new basis for using them, namely in order to reform the legal aid scheme.

Given our statutory duties to establish, maintain and develop the legal aid scheme in England and Wales, to ensure quality of service to clients and value for public funds, the LSC considers these are reasonable and necessary provisions.¹⁶

4.2 Administrative Court judgment, July 2007

Although 95% of firms subsequently signed the contract,¹⁷ on 20 April 2007 the Law Society issued judicial review proceedings and simultaneously offered mediation in relation to the LSC's right to unilaterally amend the unified legal aid contract.

The Law Society (together with a solicitors' firm, Dexter Montague, that had issued identical proceedings) contended that Clause 13 of the Unified Contract gave the LSC wide powers to amend the whole contract at short notice, which contravened the principle of transparency under EC law. It also claimed that under the terms of the Unified Contract, solicitors' firms could not determine with reasonable certainty what their rights and obligations would be when considering whether to enter into the Unified Contract. The Society argued that this violated requirements under the *Public Contracts Regulations 2006* for the LSC to act in a transparent way, in particular:¹⁸

- regulation 4(3), which required contracting authorities to treat economic operators equally and in a non-discriminatory way, and to act transparently; and
- regulation 9, which required that where contracting authorities wanted technical specifications to be met, those specifications had to be set out in the contracting documents.

The LSC argued that there was transparency in its contract process because the terms of the Unified Contract, including the power of amendment, were known in advance as they had been referred to in its 2006 consultation paper *Legal Aid Reform: The Way Ahead* and on the LSC website. Moreover, because legal aid was being reformed in stages, the intention behind the power to amend the contract was to allow a series of reforms while at the same time offering solicitors and other providers contracts for three years rather than six months. The LSC also contended that the Unified Contract was a 'public service concession'¹⁹ and was not therefore subject to the *Public Contracts Regulations 2006*.

The court ruled that:

- the Unified Contract was not a public service concession and was therefore subject to the 2006 Regulations;
- the LSC's power of amendment complied with the transparency required by regulation 4(3), but the broad power to alter the technical specifications in the contract did not comply with regulation 9; and

¹⁶ Legal Services Commission press release, [Most civil legal aid providers commit to new contracts](#), 30 March 2007

¹⁷ **R (on the application of the Law Society) v Legal Services Commission, Dexter Montague & Partners (a firm) v Legal Services Commission* [2007] EWHC 1848 (Admin) [2007] All ER (D) 441 (Jul)

¹⁸ The 2006 Regulations implemented an EC Directive on public procurement.

¹⁹ A 'public services concession' is a concession that gives the right to exploit the service/s to be provided under a contract.

- the LSC was entitled, and obliged, to seek the best possible value for money.²⁰

Commenting on the judgment, the Law Society said:

Most significantly, the judge said that changes to the contract should not be made if they would, 'alter the economic balance of the contract to the disadvantage of those who have entered into the Unified Contract or to the disadvantage of some of them.'

The judge also noted that any proposed changes should be restricted to those envisaged by the initial White Paper. It is not clear at this stage how this will affect the LSC's proposals on fees and the Judge has granted the Law Society permission to appeal on the basis of public interest on this point.²¹

The LSC welcomed the fact that the judgment meant that new fee schemes could still be introduced from October 2007. Carolyn Regan, Chief Executive of the LSC, said:

"I am obviously pleased that the court has confirmed that it is lawful for the LSC to amend the unified contract to introduce the new civil legal aid fee schemes from October 2007.

"The legal aid reforms are specifically about maximising access to legal aid for the future. By achieving best value for money and rebalancing the overall budget to provide more funding for civil work we can continue to increase the number of people helped."²²

4.3 Court of Appeal judgment, November 2007

The Law Society and Dexter Montague appealed against the decision in relation to regulation 4(3), and the LSC and Lord Chancellor cross-appealed against the decision on regulation 9.

The Court of Appeal allowed the Law Society's appeal and dismissed that of the LSC. The court held that the Unified Contract did not meet the requirement for transparency of contractual terms set out in regulation 4(3) of the *Public Contract Regulations 2006*, stating:

The power of amendment is so wide in this case that it amounts to a power to rewrite the Contract.²³

Commenting on the judgment, the Law Society said:

The LSC's right to unilaterally amend the unified contract is severely curtailed, if not destroyed. We are urgently consulting counsel to determine the precise ramifications for our members and our ongoing strategy.²⁴

The Legal Aid Practitioners Group said:

We are pleased that the Court of Appeal has confirmed that the wide ranging power to amend the contract between the LSC and legal aid lawyers is unlawful. No business

²⁰ **R (on the application of the Law Society) v Legal Services Commission Dexter Montague & Partners (a firm) v Legal Services Commission* [2007] EWHC 1848 (Admin) [2007] All ER (D) 441 (Jul)

²¹ Law Society press release, [Law Society secures court win on legal aid](#), 27 July 2007

²² LSC press release, [Legal aid reform programme continues following High Court ruling](#), 27 July 2007

²³ *R (on the application of the Law Society) v Legal Services Commission; Dexter Montague & Partners (a firm) v Legal Services Commission* [2007] EWCA Civ 1264 [2008] 2 All ER 148, para 76

²⁴ Law Society press release, [Law Society wins legal aid appeal over contract](#), 29 November 2007

should be expected to sign a contract with such power being given to one contracting party, creating such uncertainty.²⁵

The LSC said:

The Appeal Court judgment recognises that changes may become necessary or desirable during the life of a contract and that bodies like the LSC may need the power to amend contract terms.

However, it gives no specific indication about the kind of amendments that could be made to an existing contract and the kind that would require a new contract. We will therefore be looking to develop an alternative amendment provision which is not open to challenge. If this cannot be achieved, we will have no choice but to terminate and re-tender for contracts much more frequently than in the past.²⁶

4.4 Further period of dispute

Following the Court of Appeal judgment there was a period of further dispute between the Law Society and the LSC regarding its interpretation, in particular how it affected the LSC's right to make amendments to the Unified Contract. In January 2008, the Law Society said it would be issuing further judicial review proceedings claiming that the LSC's October 2007 amendments to the Unified Contract were ineffective:

Although the LSC has now accepted that our position on clause 13.1 of the Unified Contract was correct, it sought to continue to rely on clause 13.2 to justify the October amendments to the contract. While the LSC continues to insist that the judgment has no effect on the amendments it has purported to make, and refuses to take the action required of it by EU law, there is a fundamental disagreement which, in the interests of achieving clarity, may have to be resolved in court.²⁷

4.5 Agreement

In April 2008 an agreement was reached between The Law Society, the LSC and the Ministry of Justice (MOJ). The main features of the agreement were outlined by Lord Hunt of Kings Heath, Parliamentary Under Secretary of State at the Ministry of Justice, in a written statement:

The Legal Services Commission (LSC), the Ministry of Justice and the Law Society of England and Wales today reached agreement on the best way forward for legal aid providers following the Court of Appeal judgment on the unified contract (29 November 2007).

The agreement was achieved through a series of constructive discussions between the three organisations. The agreement is designed to provide a significant period of certainty and stability for civil legal aid providers to enable them to adapt to the changes to the legal aid system that have already been introduced, and to consider and plan for the future. The agreement also addresses a number of specific issues that the Law Society has identified to the LSC and Ministry as being of concern to civil legal aid providers and, where these issues require further consideration, sets up joint mechanisms to address these collaboratively.

²⁵ LAPG press release, *Welcome for court of appeal result*, 01 December 2007

²⁶ LSC press release, *Unified Contract JR decision provides clarification. Legal aid reform programme continues*, 29 November 2007

²⁷ *Unified contract: Society to issue second judicial review*, Law Society press release, 30 January 2008 <http://www.lawsociety.org.uk/newsandevents/news/view=newsarticle.law?NEWSID=382948>

The main points of the agreement are:

in order to provide a period of certainty and stability for civil legal aid providers it is agreed not to terminate the existing civil unified contract until it expires in 2010, subject to the conditions set out in the agreement;

my department and the LSC agree not to introduce any other changes to civil, family and asylum contracts for solicitors and not-for-profit providers before April 2010, other than those set out in the agreement;

the Law Society agrees not to pursue its current legal challenge to the new civil fee schemes introduced in 2007 and early this year, and not to support any further such challenges;

to assist providers in planning for the future, my department and the LSC agree to publish details and a timetable of the future programme of civil legal aid reforms;

that all three organisations have a strong commitment to work together in the future to develop the reforms and to seek to resolve any disputes in this way rather than through litigation;

there will be a few targeted increases in some of the fees in the civil fee schemes already introduced; and

further practical issues, including arrangements for dealing with payments on account and claims on cases over six years old, are set out in the agreement.²⁸

In a joint statement from the three parties to the agreement, the MOJ and the LSC said that they would not challenge the Court of Appeal decision. They also expressed regret that the implications of the *Public Contracts Regulations 2006* “had not been recognised earlier” and recognised that the Law Society was justified in commencing proceedings. All three parties expressed a desire to work together for the benefit of clients:

There is a strong commitment, on the part of the three organisations, to delivering the substance of this agreement. However, all consider that the process of reaching the agreement and the strong commitment to work together in this way in the future, are, in many ways, the most important outcome.²⁹

The MOJ and the LSC also acknowledged that the Court of Appeal judgment meant that the only power of amendment that remained in the Unified Contract was the power in Clause 13.2, which provides:

2. We may make such amendments to this Contract as we consider necessary in the circumstances to comply with, or take account of, any U.K. legislation or any EU legislation having direct effect, or as a result of any decision of a U.K. court or tribunal, or a decision of the European Court of Human Rights or of the European Court of Justice or any other institution of the European Union, or to comply with the requirements of any regulatory body or tax or similar authority.

Such amendments may include without limitation:

(a) amendments to any of the terms of a Schedule;

²⁸ HL Deb 2 April 2008 c103-4WS. Further details of the agreement, including a link to the full deed of settlement, are available on the [LSC website](#).

²⁹ The Law Society/MOJ/LSC, [Joint Statement](#), DEP2008-0941, 1 April 2008

- (b) changes to payment provisions;
- (c) imposing controls not previously imposed;
- (d) excluding from this Contract any description of Contract Work; and
- (e) amending procedures in the Specification.³⁰

5 The 2010 Unified Contract

The April 2008 agreement included a commitment to publish details and a timetable of future changes to civil legal aid contracts. A five year plan and a 'route map' were published by the LSC on 10 April 2008.³¹ The five year plan set out an outline timetable for future changes, including a 12 week consultation on the terms of the 2010 Unified Contract.³²

April 2008	Publication of consultation paper (Delivery Transformation) on new ways of working between suppliers and LSC from April 2010
May 2008	MoJ and LSC consultation on changes to Family Graduated Fees for the Bar (FGF).
September 2008	LSC 12 week consultation on stage 2 of family fixed fees for solicitors and counsel and the award and terms of new Unified Contracts from April 2010
January 2009	Report on operation of stage 1 fees and 6 week consultation on any changes to those existing fees to be made for April 2010
January - April 2009	Implementation of changes to FGF scheme
Spring 2009	Consultation paper on best value tendering (BVT) in civil legal aid
April 2009	Announcement of decisions on terms of new contract, stage 2 family fees and bid round process
May-December 2009	Bid round process for the award of the new civil Unified Contract in April 2010
April 2010	Current civil Unified Contract expires and new contract awards come into effect along with stage 2 family fees
2010-2011	Trials of BVT begin in a small number of geographical areas
From April 2013	Possible roll out of civil BVT

The LSC stated that it remained committed to the introduction of best value tendering for civil legal aid work:

³⁰ LSC, [Unified Contract Standard Terms 2007](#), Clause 13.2

³¹ Legal Services Commission, [Civil legal aid contracts: the next five years](#) and [Civil route map](#), April 2008

³² Ibid, pp2-3

It is LSC's view that the introduction of best value tendering remains the best way ultimately of establishing services that provide the appropriate levels of quality and access at a price that is viable for both the taxpayer and legal aid provider. LSC also considers that best value tendering contracts will allow both legal aid providers and LSC the certainty of duration and service provision that will give long-term stability. LSC has already operated best value tendering for certain services, such as telephone services and Community Legal Advice Centre contracts (and will continue to do so as centres and networks roll out).³³

In October 2008, the LSC published a consultation paper on the civil bid rounds for 2010 contracts.³⁴ The consultation period ran from 31 October 2008 until 23 January 2009. The consultation focused on five broad areas:

- the types of services the LSC wants to buy;
- where services will be delivered;
- how the LSC will procure services;
- changes to the scope of funding; and
- key changes to the Unified Contract.

In relation to the Unified Contract, the consultation paper states:

... this paper seeks to begin the consultation on key contract changes. These are broadly set out in principle as precise contract terms and further detail will be the subject of separate discussions with representative bodies.³⁵

Some of the key contract changes that are being consulted on include:

- Minor restructuring of the standard terms and specification, for example moving certain provisions that are currently in the standard terms to the specification or separate schedules of the contract.
- Updating the confidentiality and data protection provisions to comply with new Office of Government Commerce recommendations.
- Amending the dispute resolution arrangements under which providers raise disputes on their contracts.
- Introducing new forms of contracting arrangements to enable providers to group together as consortia to apply for, and hold, contracts in social welfare legal services.
- Introducing a new power for the LSC to change the contract. The new power would be based on the Unified Contract (Crime) July 2008 and the amended change provision introduced in July 2008 to the Unified Contract (Civil) April 2008. The consultation paper indicates that the power would enable the LSC:
 - To amend the contract in response to legislative changes and decisions by courts, tribunals and regulatory bodies

³³ Ibid, p

³⁴ LSC, [Civil bid rounds for 2010 contracts: a consultation](#), October 2008

³⁵ Ibid, para 2.15

- To make changes to reflect wider changes in the justice system
- To take account of any specific future plans and changes of which we are aware when the Contract is awarded (and which can therefore be outlined in the Contract)
- To make minor amendments and amendments which are procedural or technical
- To clarify ambiguities or correct errors or omissions.

8.20 All changes will be subject to consultation with the Law Society and ASA [*Advice Services Alliance*], as at present.³⁶

- Making key performance indicators on quality of work, value for money and client access mandatory and imposing sanctions on providers who fail to meet them.

Further details on the proposed changes to the Unified Contract are set out in Chapter 8 of the consultation paper.

³⁶ Ibid, paras 8.19-20